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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WISCONSIN DEPARTMENT OF INDUSTRIAL, LABOR AND HUMAN RELATIONS, *et al.*,
Appellants,

v.

GOULD, INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE APPELLANTS

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

DAVID M. SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

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The American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), a federation of 95 national and international labor organizations with a total membership of 13,500,000 working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for in this Court's rules.

SUMMARY OF ARGUMENT

1. With but two exceptions, this Court's labor law preemption cases have all involved challenges to state laws (whether established legislatively or through common-law adjudication) which prescribe rules of conduct intended to be binding on private parties—including employers, employees and labor organizations involved in a labor dispute—and enforceable through a state judicial or administrative proceeding. In this context, the Court has "announced two doctrines for determining whether state regulations or causes of action are preempted by the National Labor Relations Act," *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983)—the doctrine of *San Diego Unions v. Garmon*, 359 U.S. 236 (1959) and that of *Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132 (1976).

But States act in a variety of ways. With respect to any of these forms of state activity, by establishing conditions for participation in state run programs a State may intend to affect, and may affect, the behavior of participants, and would-be-participants, in the program. Thus, it cannot be said that what, for want of a better term, we will call laws that "directly" regulate private parties—*viz.* laws that prescribe a rule of conduct that is enforceable in a judicial or administrative proceeding—and laws that establish eligibility conditions for participating in state programs are different from one another in kind. Nonetheless, there is a clear intuitive difference in degree—which in appropriate settings this Court has deemed legally dispositive—between direct state regulation of private conduct and state efforts to affect private conduct through contractually-based incentives and disincentives. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983).

At the most general level, the question posed here is the extent to which the preemption rules that have been

developed in the context of direct regulation are transferrable to other settings. In particular, that question arises in the context of a Wisconsin law enunciating the State's decision not to do business with repeat violators of the NLRA. And, the precise issue presented is therefore whether the *Garmon* rule precludes the States from basing their purchasing decisions on a National Labor Relations Board determination that a would-be seller is a labor-law violator.

2. The State argues that the *Garmon* preemption doctrine has no application whatsoever to the state acting as a market participant. In our view, however, this case cannot be so easily disposed of for two independent reasons.

First, the premise of the State's argument is unsound: the NLRA is not, as the State supposes, limited to governing only an employer's relations with its own employees. As this Court has recognized, "[t]he Board has held that a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own. *Austin Co.*, 101 NLRB 1257, 1258-59." *Hudgens v. NLRB*, 424 U.S. 507, 510 n. 3 (1976). That Board holding covers employers acting as buyers and sellers.

Second, the State's argument is not dispositive in any event for certain conduct is "protected against state, but not employer interference," *Machinists v. Wisconsin Emp. Rel. Comm'n.*, *supra*, 427 U.S. at 145 n. 6; that is the entire point of the *Machinists* branch of the preemption doctrine.

3. In equating the type of state action at issue here with the direct regulation involved in *Garmon* and its progeny, the court below obscured analysis of the problem presented by this case. There are at least three respects in which, from the perspective of the labor law preemption doctrine, the type of state activity at issue here is distinct:

First, in deciding whether to enact a law directly regulating private conduct, the State has the option of not becoming involved; an option that is exercised by leaving the conduct unregulated. Non-regulation cannot fairly be said to constitute state support of, or participation in, the conduct in question. When a State ventures outside of the area of direct regulation, however, the State confronts situations in which the option of neutrality does not exist.

Second, as previously noted, Wisconsin has not established any generally applicable rules of conduct that bind private parties within (or outside) the State. Every employer has the choice of competing or not competing for the State's business; only if an employer elects the former option will its conduct be examined to determine if the employer has met each of the conditions for doing business with the State (here, obeying the NLRA).

A third and related distinction between the type of state activity involved here and the type of state activity that has been at issue in the run of preemption cases is that, precisely because the State has not mandated any rules of conduct for private parties intended to be generally binding, there is no state judicial or administrative system for interpreting, developing, and enforcing a state rule or policy in the labor relations context.

Each of these considerations cuts against applying the *Garmon* doctrine by rote to this case.

4. This Court has decided two analogous labor preemption cases, *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519 (1979), and *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235 (1967). The ultimate lesson taught by *New York Telephone* and *Nash* is that state action that takes a form other than direct regulation of private parties raises a myriad of complex preemption questions and that the *Garmon* and *Machinists* doctrines,

which were fashioned to deal with such direct regulation, will not always be transferrable to state actions intended to influence such activity through contractual conditions. This Court's reminder last Term, in addressing the labor law preemption doctrine, that "as in any preemption analysis '[t]he purpose of Congress is the ultimate touchstone,' " *Metropolitan Life Ins. Co. v. Massachusetts*, —— U.S. ——, 53 L.W. 4616, 4622 (June 3, 1985), is therefore particularly pertinent here. And a state rule denying state contracts to labor-law violators does not contain any of the indicia of a law Congress intended the NLRA to preempt.

To begin with, in deciding not to do business with recidivist labor-law violators, a State acts as a market participant, and in a manner in which any other market participant is free to act. Moreover, to the extent Wisconsin's decision not to buy from recidivist labor-law violators influences private behavior, that influence will be the product of the amount of purchasing power the State happens to enjoy. In both senses, as the State argues, its actions are no different from a refusal by General Motors to deal with labor-law violators. These are the factors, we believe, that inform this Court's recent decisions sustaining state actions as market participants against claims that the States were burdening interstate commerce. *See, e.g., White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983).

Furthermore, assuming *arguendo* that state market activity may, in certain circumstances, conflict with the NLRA, a decision not to deal with violators of the Act does not do so. Such a decision—unlike the decision in *Nash v. Florida Industrial Comm'n, supra*—does not encourage activity violative of the Act or discourage activity that the Act seeks to protect; rather, such a decision promotes compliance with the NLRA's demands. Appellee suggests, however, that Wisconsin's refusal to deal with labor law violators conflicts with the national

labor policy because the state rule injects a penal provision into an Act which "is essentially remedial." *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10 (1940). See Motion to Affirm at 1. Appellee is mistaken. The NLRA establishes the adverse consequences for violating the Act a court or an administrative agency may decree; the States are therefore not free to add to those consequences (and *a fortiori* are not free to enact punitive sanctions for violations of the Act). But the NLRA does not determine or limit the other adverse consequences that may flow from violating the Act's commands; the Act does not, for example, shield violators from economic retaliation or economic ostracism, no matter how "punitive" such a response may be.

Moreover, appellee's argument ignores the fact that when a recidivist labor-law violator bids on a state contract, the State has only two available choices: the State must either deal or not deal with the violator. There is not a neutral position available to the State, the only alternative to the "penalty" of not dealing, is the reward of dealing. In these circumstances, it is inconceivable that the Act compels the course of conduct that aids the labor-law violator.

As *Nash v. Florida Industrial Comm'n.*, *supra*, shows, the States do not have unlimited power to set conditions on state contracts and benefits that affect the manner in which employers, employees and unions governed by the NLRA conduct themselves. But the foregoing demonstration is, we submit, more than sufficient to show that a State's decision not to deal with labor-law violators does not "conflict[] with . . . federal law or frustrate the federal scheme," *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, 53 L.W. at 4622. Accordingly, the Wisconsin statute at issue here is not preempted.

ARGUMENT

A. At first blush, this case presents "a variant of a familiar theme," *Operating Engineers v. Jones*, 460 U.S. 669, 675 (1983)—a claim that state action is preempted by the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* ("NLRA" or "the Act"). But on closer inspection, it becomes apparent that the question presented here is quite different from the preemption questions with which this Court is most familiar, because the nature of the state action at issue here is quite different.

With but two exceptions which we discuss, *infra* at 16-18, this Court's NLRA preemption cases have all involved challenges to state laws (whether established legislatively or through common-law adjudication) which prescribe rules of conduct intended to be binding on private parties—including employers, employees and labor organizations involved in a labor dispute—and enforceable through a state judicial or administrative proceeding—a proceeding designed to secure compliance with the underlying norm. The State was acting, in short, to regulate the conduct of private parties through the classic governmental means to that end.

In this context, the Court has "announced two doctrines for determining whether state regulations or causes of action are preempted by the National Labor Relations Act." *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1983). The first—the doctrine of *San Diego Unions v. Garmon*, 359 U.S. 236 (1959)—addresses state regulation of conduct that is or may be regulated by the Act; the "concern[] [is] with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing re-

medial schemes." *Id.* at 242.[1] The second preemption doctrine—that of *Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132 (1976)—"proscribes state regulation and state law causes of action concerning conduct that Congress intended to be unregulated." *Belknap, supra*, 463 U.S. at 498.

But States act in a variety of ways. States deliver goods and services; States purchase goods and services for their own use and for the use of their citizens; and States administer a variety of programs through which money or other benefits are distributed to individuals and businesses. With respect to any of these forms of state activity, by establishing conditions for participation in state run programs a State may affect the behavior of participants, and would-be participants, in the program. Indeed, such conditions often are adopted for that very purpose and may have a more powerful effect

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[1] The *Garmon* doctrine actually encompasses several discrete rules, each reflecting a separate concern with state regulation of conduct to which the NLRA may apply.

First, *Garmon* proscribes state regulation of conduct affirmatively protected by the Act; here "preemption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right." *Brown v. Hotel and Restaurant Employees*, —— U.S. ——, 52 L.W. 5042, 5045 (July 2, 1984).

Second, *Garmon* proscribes state regulation of conduct prohibited by the Act; this is because, "[t]he technique of administration, the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the NLRA." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971); *see also Garner v. Teamsters Union*, 346 U.S. 485 (1953).

Third, and finally, *Garmon* proscribes state regulation of conduct arguably protected or prohibited by the Act; this is a "prophylactic rule," *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 187 (1978), required because of the impracticality of this Court "proceed[ing] on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy," *Motor Coach Employees v. Lockridge, supra*, 403 U.S. at 289.

on the conduct of private parties than even a criminal law. Thus, it cannot be said that what, for want of a better term, we will call laws that "directly" regulate private parties—*viz.* laws that prescribe a rule of conduct that is enforceable in a judicial or administrative proceeding—and laws that establish eligibility conditions for participating in state programs are different from one another in kind in either their purposes or their effects. Nevertheless, there is a clear intuitive difference in degree—which in appropriate settings this Court has deemed legally dispositive—between direct state regulation of private conduct and state efforts to affect private conduct through contractually-based incentives and disincentives. As the Court stated in *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549-550 (1983):

> We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley* v. *Valeo*, 424 U.S. 1 (1976), upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny. *Id.*, at 93-108. *Harris* v. *McRae*, 448 U.S. 297 (1980), and *Maher* v. *Roe*, 432 U.S. 464 (1977), considered legislative decisions not to subsidize abortions, even though other medical procedures were subsidized. We declined to apply strict scrutiny and rejected equal protection challenges to the statutes.
>
> The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Harris*, *supra*, at 316. . . . [T]he Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." 448 U.S., at 318. As we said in

> *Maher*, "[c]*onstitutional concerns are greatest when the State attempts to impose its will by force of law* . . . ." 432 U.S., at 476. Where governmental provision of subsidies is not " 'aimed at the suppression of dangerous ideas,' " *Commarano* [v. *United States*], 358 U.S., at 513, *its "power to encourage actions deemed to be in the public interest is necessarily far broader." Maher, supra*, at 476. [Emphasis added.]

At the most general level, the question posed here is the extent to which the preemption rules that have been developed in the context of direct regulation are transferrable to other settings. In particular, the question arises here in the context of a Wisconsin law enunciating the State's decision not to do business with repeat violators of the NLRA.

There is no doubt that if Wisconsin, as a matter of state law, had decreed that employers and unions are to obey the requirements of the NLRA, had established state-law sanctions for repeated violations of that general norm and had created a judicial or administrative cause of action to make that norm enforceable, such a state law would be preempted. This much was settled as long ago as *Bethlehem Co. v. State Board*, 330 U.S. 767 (1947), and was expressly reaffirmed in *Garmon*: "When it is clear or may fairly be assumed that the activities which a State purports to regulate . . . constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244.

But Wisconsin has *not* mandated any rule of conduct binding on all employers within Wisconsin, and *a fortiori* has not created any cause of action making such a rule judicially or administratively enforceable; rather, Wisconsin has made a decision as to whom the State will do business with, a decision which, like any purchasing decision, has consequences for—and may influence the behavior of—employers who seek state business. The precise issue here is therefore whether the *Garmon* rule precludes the States from basing their purchasing de-

cisions on a National Labor Relations Board determination that a would-be seller is a labor-law violator.[2]

B. The State argues that the *Garmon* preemption doctrine has no application whatsoever to the state acting as a market participant. According to the State:

> Congress has not legislated in the area of market participant choices. General Motors can elect not to deal with labor law recidivists without offending the NLRA, for the NLRA governs General Motors' relations with its employees, not its trading partners. Wisconsin, as a matter of its sovereignty, enjoys the same privilege. [Jur. Stat. at 18.]

In our view, however, this case cannot be so easily disposed of for two independent reasons.

First, the premise of the State's argument is unsound: the NLRA is not limited to governing only an employer's "relations with its employees." In particular, § 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7". This command on its face goes beyond the employer's own employees and, indeed, the term "employee" is expressly defined to mean "any employee, and shall not be limited to the employees of a particular employer." NLRA § 2(3).[3] Thus, as this Court has recognized, "[t]he Board has held that a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own. *Austin Co.*, 101 NLRB 1257, 1258-59." *Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976).

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[2] No claim is made here that the *Machinists* doctrine, which applies where Congress intended an area to be unregulated by any authority, applies in this fact situation. *See also* pp. 16-17, *infra*.

[3] *See also* § 2(9): "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee."

The *Austin Co.* case which the Court cited in *Hudgens* is the seminal decision in a line of NLRB cases that addresses the extent to which actions taken by an employer in its capacity as trading partner violate the Act. In *Austin Co.*, the employer cancelled a contract under which a security agency was to provide guards for the employer's property; the employer did so because the guards being used by the contractor were not members of the union that represented the employer's employees. The Board held that the employer had acted unlawfully in cancelling the contract for that reason. In subsequent cases, the Board has found violations in an employer's refusal to allow a repairman onto the employer's premises to do repair work for which the employer had contracted where the employer's ground for refusal was that the repairman was a union activist,[4] or was wearing a union insignia.[5] And in one case especially noteworthy for present purposes, the Board found that a credit union had acted unlawfully in establishing and enforcing a rule which precluded employees of organized employers from participating in the credit union.[6] Thus, while the NLRA speaks principally to the relationship between an employer and its own employees—and while in most respects the Act leaves an employer's actions as purchaser unregulated—Wisconsin overstates the case in contending that "the NLRA governs [an employer's] relations with its employees, not its trading partners."

Second, even if, *arguendo*, it were true that the Act places no limits on the trading decisions of private parties, it would not *necessarily* follow that the States would enjoy a like freedom under the preemption doctrine. This

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[4] *West Texas Utilities Co.*, 108 NLRB 407 (1954), *enf'd* 218 F.2d 824 (5th Cir. 1985).

[5] *Fabric Services, Inc.*, 190 NLRB 540 (1971). *See also Holly Manor Nursing Home*, 235 NLRB 426 (1978).

[6] *AM Steigerwald Co.*, 236 NLRB 1512 (1978).

Court's decisions make clear that, at least in the regulatory context, the limitations imposed on state action by the preemption doctrine are not coterminous with the limitations imposed on private action by the substantive provisions of the NLRA. To the contrary, certain conduct is "protected against state, but not employer interference," *Machinists v. Wisconsin Empl. Rel. Comm'n*, *supra*, 427 U.S. at 145 n.6; that is the entire point of the *Machinists* branch of the preemption doctrine. Thus, even if it were true that the Act left private parties wholly unregulated with respect to their conduct as traders, that fact would pose—but would not necessarily answer—the question whether the States enjoy a like freedom.

C. If the State's analysis is insufficient to resolve this case, the analysis of the court of appeals is even less helpful. That court viewed this case as a simple case of direct state regulation of private conduct and thus a case easily within *Garmon's* reach:

> The Wisconsin legislature seeks to prohibit activity also prohibited by the NLRA. *Garmon*, *supra*, teaches that state regulation of both activity protected and prohibited by the NLRA is preempted. [J.S. App. at 16.]

And in a single sentence the court of appeals disposed of the fact that the State was acting as a purchaser, arguing that the Commerce Clause cases on which the State relied to justify its claim of freedom to act as a market participant "do not address the issue before us, the range of state *regulation* allowable when Congress has legislated decisively in the area." J.S. App. at 22 (emphasis added).

In equating the type of state action at issue here with the direct regulation involved in *Garmon* and its progeny, the court below obscured analysis of the problem presented by this case. There are at least three respects in which, from the perspective of the preemption doctrine, the type of state activity at issue here is distinct.

First, in deciding whether to enact a law directly regulating private conduct, the State has the option of not becoming involved; an option that is exercised by leaving the conduct unregulated. Non-regulation cannot fairly be said to constitute state support of, or participation in, the conduct in question. *Cf. County of Washington v. Gunther*, 452 U.S. 161, 169 (1981). In that critical sense, the State's posture is one of neutrality. When a state ventures outside of the area of direct regulation, however, the State confronts situations in which the option of neutrality does not exist.

The point is best made by a simple hypothetical. In the course of a labor dispute, a union urges consumers to boycott the products of a struck employer who is continuing production during the course of the strike by using persons hired to replace the striking workforce.[7] The State must decide whether to purchase the employer's struck goods. In such circumstances, there is no neutral position available to the State: if the State ignores the boycott and purchases from the employer, it aids the employer and disadvantages the union; if the State refuses to purchase, the reverse is true. Thus, the question to which the preemption doctrine has responded—when should the State leave private conduct alone—is not always a relevant question in the regulatory context.

Second, as previously noted, Wisconsin has not established any generally applicable rules of conduct that bind private parties within (or outside) the State. No legal duty enforceable through judicial or administrative proceedings is imposed on any employer. Every employer has the choice of competing or not competing for the State's business; only if an employer elects the former

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[7] This is not a wholly-hypothetical example. *See J.P. Stevens & Co. v. Jackson*, 85 Lab. Cases ¶ 10,980 (N.D. Ga. 1978) (refusal of City of Atlanta to purchase from J. P. Stevens until the company "cease[s] and desist[s] from . . . discriminatory and illegal practices).

option will its conduct be examined to determine if the employer has met each of the conditions for doing business with the State (here, obeying the NLRA). The fact that the State has not established an overall legal rule in the usual sense is significant, we submit, because "the constitutional principles of preemption, in whatever particular field of law they operated, are designed with a common end in view: to avoid conflicting regulation of conduct by various offiical bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, *supra*, 403 U.S. at 285. And, the danger of "conflicting regulation" is at its greatest when a State prescribes normative rules of conduct intended to bind private parties.

A third and related distinction between the type of state activity involved here and the type of state activity that has been at issue in the run of preemption cases is that, precisely because the State has not mandated any rules of conduct for private parties intended to be generally binding, there is no state judicial or administrative system for interpreting, developing, and enforcing a state rule or policy in the labor relations context. This is significant because, as Justice Harlan observed, a "primary factor in the enactment of the NLRA" was the "perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good." *Motor Coach Employees v. Lockridge*, *supra*, 403 U.S. at 286. Consequently, "[t]he principle of preemption that informs our general national labor law was born of this Court's efforts . . . to delimit the state and federal judicial authority over labor disputes," *id.* Indeed, "there is general agreement on the proposition that the 'animating force' behind the doctrine is a recognition that the purposes of the federal statute would be defeated if state and federal courts were free, without

limitation, to exercise jurisdiction over activities that are subject to regulation by the NLRB. *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 527 (1979). These concerns are not implicated by state decisions of the type involved here.

For all these reasons, the court of appeals erred in simply ignoring the distinction between regulation and other types of state activity.

D. This Court has decided two analogous labor preemption cases: *New York Tel. Co.*, *supra*, and *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235 (1967). Those two decisions are instructive on the problem presented here.

In *New York Telephone* an employer challenged the State's decision to pay unemployment compensation to strikers; the employer argued that New York is precluded from doing so by the *Machinists* rule requiring the States to "allow[] the free play of economic forces to operate during the bargaining process." 440 U.S. at 531. The Court rejected the employer's challenge and upheld New York's action. The plurality opinion began by noting some of the differences between the employer's challenge in that case and the Court's prior preemption cases:

> Unlike . . . *Machinists*, as well as the main body of labor preemption cases, the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. It involves a state program for the distribution of benefits to certain members of the public . . . [T]he general purpose of the program is not to regulate the bargaining relationship . . . but instead to provide an efficient means of insuring employment security in the State. It is therefore clear that even though the statutory policy underlying . . . *Machinists* lends support to petitioners' claim, [its] holdings . . . are not controlling. The Court is being

> asked to expand the doctrine of labor law preemption into a new area. [440 U.S. at 532-533.]

The Court found it unnecessary to explain these differenses fully because the intertwined legislative histories of the NLRA and the Social Security Act demonstrate that Congress intended to leave the States free to decide whether to provide unemployment compensation to strikers. *See id.* at 537-545. But the fact of the matter is that although the employer in *New York Telephone* complained that the State had "altered the economic balance between labor and management," *id.* at 532, the State was necessarily required, in order to administer its unemployment compensation program, to decide whether persons who are out of work because of a strike qualify for benefits, and any decision the State made would equally affect that "economic balance." Thus, even absent the dispositive legislative guidance that was available, the *Machinists* principle simply did not fit that case.

Nash v. Florida Industrial Comm'n. illustrates a very different aspect of the preemption problems generated by a state decision to impose labor-related conditions for participation in a state-run program. At issue was Florida's determination to deny unemployment compensation to an individual who while unemployed filed an unfair labor practice charge with the NLRB challenging her employer's action in terminating her employment. Unlike the situation in *New York Telephone*, the State could have paid benefits to the individual without siding with either the employer or the individual in the case before the Labor Board, and unlike *New York Telephone*, the effect of Florida's eligibility rule was to discourage an action protected by federal law—filing a charge with the NLRB. In these circumstances, the Court unanimously concluded that the NLRA precludes the States from using the filing of an unfair labor practice charge as a ground for denying unemployment compensation:

> It appears obvious to us that the financial burden which Florida imposes will impede resort to the Act

> and thwart congressional reliance on individual action. A national system for implementation of this country's labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan. [389 U.S. at 239.] [8]

E. The ultimate lesson taught by *New York Telephone* and *Nash* is that state action in forms other than direct regulation raises a myriad of complex preemption questions and that the *Garmon* and *Machinists* doctrines, which were fashioned to deal with direct regulation of private activity, will not always be transferrable to state actions intended to influence such activity through contractual conditions. The law with respect to this latter

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[8] The line between *Nash* and *New York Telephone* is similar to a distinction this Court has drawn in related contexts. For example, in *Maher v. Roe*, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980), the Court held that the government is free to deny financial assistance to an indigent woman desiring (or in need of) an abortion, even though such assistance is provided for other medical procedures, including the delivery of a child. The Court concluded that there is no "constitutional obligation . . . to subsidize abortions," *McRae, supra*, 448 U.S. at 297.

At the same time the Court indicated that the government may *not* deny all medicaid benefits or general welfare assistance to one who has had an abortion as such a denial would penalize the exercise of the right to choose an abortion. *McRae, supra*, 448 U.S. at 317 n.19; *Maher, supra*, 474-475 n.8. *Cf. also, Buckley v. Valeo*, 424 U.S. 1, 57 n.5 (1976) (government may impose limitations on a candidate's free speech rights as a condition of the candidate's receipt of public funds that could not be imposed on candidates generally); *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) ("our cases have long recognized that Congress may fix the terms on which it shall disburse federal money"); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (employer not required to provide disability benefits to women disabled because of pregnancy or childbirth, but employer may not deprive such women of seniority as the latter constitutes "a substantial burden" on the exercise of the underlying right rather than the denial of a benefit).

set of issues is in an embryonic state, and we submit all that can be said with confidence at this early stage in the law's development is that the limitations on state authority "are not susceptible of delimination by fixed metes and bounds," and "can be rendered progressively clear only by the course of litigation." *Weber v. Anheuser-Bush, Inc.*, 348 U.S. 468, 480-81 (1955); *see also Machinists v. Gonzales*, 356 U.S. 617, 619 (1958). With that in mind, we turn from the broader setting in which this case is located, to the narrow question posed here: may a State refuse to deal with labor-law violators? As we proceed to demonstrate, that question must be answered in the affirmative.

Just last Term, in addressing the labor law preemption doctrine, the Court reminded that "as in any preemption analysis '[t]he purpose of Congress is the ultimate touchstone.'" *Metropolitan Life Ins. Co. v. Massachusetts*, —— U.S. ——, 53 L.W. 4616, 4622 (June 3, 1985). And the Court set forth the basic approach for ascertaining Congress' intent:

> Where the preemptive effect of federal enactments is not explicit, courts sustain a local regulation unless "it conflicts with a federal law or would frustrate the federal scheme or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." [*Id.*]

As we now show, a state rule denying state contracts to labor-law violators does not contain any of the indicia of a law Congress intended the NLRA to preempt.

To begin with, in deciding not to do business with recidivist labor-law violators, a State acts as a market participant, *and in a manner in which any other market participant is free to act.* Whatever the limits that the NLRA imposes on the actions of employers as market participants, see pp. 17-18, *supra*, there is no conceivable basis for believing that the Act precludes an employer

from declining to do business with labor-law violators; no provision of the Act remotely touches such conduct. Thus, Wisconsin here has, as the State argues, made a decision that General Motors is free to make.

Moreover, to the extent Wisconsin's decision not to buy from recidivist labor-law violators influences private behavior, that influence will be the product of the amount of purchasing power the State happens to enjoy. In this regard, too, the State is indistinguishable from General Motors or any other factor in the market; indeed, in most markets there will be at least some private participants with greater purchasing power than any single State.

These are the factors we believe, that inform this Court's recent decisions sustaining state actions as market participants against claims that the States were burdening interstate commerce. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983).[9] In these cases, the Court has permitted States, in making purchases and sales, to discriminate against out-of-state customers, even though it is well-settled that the Commerce Clause precludes *direct regulation* that discriminates against or disadvantages out-of-state buyers or sellers. The Court has understood that state actions as a market participant do not jeopardize the values of the Commerce Clause as does state regulation; rather the Court has concluded that "[w]hen the State acts solely as a market participant, no conflict between state regulation and federal regulatory authority can arise." *United Building and Construction Trades Council v. Mayor of Camden*, —— U.S. ——, 52 L.W. 4187, 4191 (Feb. 21, 1984).

[9] The same understanding seems to lie at the root of the Court's decisions holding that the Sherman Act is applicable to state "proprietary activity" but not state "regulation." *See Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1983).

Furthermore, assuming *arguendo* that state market activity may, in certain circumstances, conflict with the NLRA, a decision not to deal with violators of the Act does not do so. Such a decision—unlike the decision in *Nash v. Florida Industrial Comm'n*, *supra*—does not encourage activity violative of the Act or discourage activity that the Act seeks to protect; rather, such a decision promotes compliance with the NLRA's demands. Appellee suggests, however, that Wisconsin's refusal to deal with labor law violators conflicts with the national labor policy because the state rule injects a penal provision into an Act which "is essentially remedial." *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10 (1940). See Motion to Affirm at 1. Appellee is mistaken.

The NLRA establishes the adverse consequences for violating the Act a court or an administrative agency may decree; the States are therefore not free to add to those consequences (and *a fortiori* are not free to enact punitive sanctions for violations of the Act.)[10] But the NLRA does not determine or limit the other adverse consequences that may flow from violating the Act's commands; the Act does not, for example, shield violators from economic retaliation or economic ostracism, no matter how "punitive" such a response may be. It would have been surprising indeed for Congress to have made it unlawful for a market participant to decide not to do business with an employer who has repeatedly violated the Act. And it would have been nothing less than startling for Congress to have decided to protect labor-law violators from a *State's* refusal to deal with Congress did not provide protection from a like refusal by any other factor in the market. For a State—unlike a private market partici-

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[10] *E.g.*, *Teamsters Union v. Morton*, 377 U.S. 252, 260-61 (1964) (State may not add punitive damages to remedies provided in the Act for a secondary boycott violative of § 8(b)(4); *see generally Garmon*, *supra*, 359 U.S. at 247 ("to allow the State to grant a remedy which has been withheld from the National Labor Relations Board only accentuates the danger of conflict").

pant—has a "sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal," *Reeves Inc. v. Stake*, *supra*, 447 U.S. at 438 n. 10, and the fair assumption is that Congress would have been especially reluctant to trench upon that "sovereign interest".

Moreover, appellee's argument ignores the fact that when a recidivist labor-law violator bids on a state contract, the State has only two available choices: the State must either deal or not deal with the violator. If a State decides not to deal, the State does not add to the adverse consequence of having violated the law. If, on the other hand, the State decides to deal with the violator, the State becomes associated with the violator and may actually enable him to profit from his misdeeds (if the violations have enabled the violator to reduce his labor costs and thus account for the violator's success in bidding for the State's business) or may provide revenue that enables the violator to continue his wrongs.[11] There is not a neutral position available to the State; the only alternative to the "penalty" of not dealing, is the reward of dealing. In these circumstances, it is inconceivable that the Act compels the course of conduct that aids the labor-law violator.

As *Nash v. Florida Industrial Comm'n.* shows, the States do not have unlimited power to set conditions on state contracts and benefits that affect the manner in which employers, employees and unions governed by the NLRA conduct themselves. *See also Regan v. Taxation With Representation of Wash.*, *supra*. But the forego-

[11] As the Court noted last Term, "One of the ultimate goals of the Act was the resolution of the problem of 'depress[ed] wages and profits' . . . Congress hoped to accomplish this by establishing procedures for more equitable private bargaining." *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, 53 L.W. at 4624. It is thus to be expected that an employer who deprives his employees of their rights under the Act may succeed in keeping wages depressed.

ing demonstration is, we submit, more than sufficient to show that a State's decision not to deal with labor-law violators does *not* "conflict[] with . . . federal law or frustrate the federal scheme," *Metropolitan Life Ins. Co. v. Massachusetts*, *supra*, 53 L.W. at 4622. Accordingly, the Wisconsin statute at issue here is not preempted.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

DAVID M. SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)